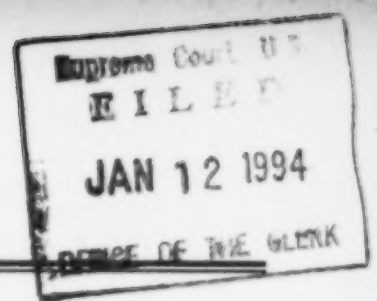


(38)
No. 93-518



In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD, OREGON,

Respondent.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE*
THOMAS H. AND ESTHER H. NELSON
IN SUPPORT OF PETITIONER

Thomas H. Nelson
Counsel of Record
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Amici Curiae

January 12, 1994

2277

No. 93-518

In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD, OREGON,

Respondent.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE*
THOMAS H. AND ESTHER H. NELSON
IN SUPPORT OF PETITIONER

Thomas H. Nelson
Counsel of Record
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Amici Curiae

January 12, 1994

QUESTION PRESENTED

Does the City of Tigard's conditioning its approval of a land use permit upon the Dolans' surrender of property rights constitute an unconstitutional condition?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED	(i)
TABLE OF AUTHORITIES	(iii)
IDENTITIES AND INTERESTS OF <i>AMICI</i> <i>CURIAE</i>	1
OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	3
CONCLUSION	7
APPENDIX A: Reprint of Portions of Staff Report, City of Lake Oswego, Land Development Services Division	A-1
APPENDIX B: Reprint of Restrictive Covenant Waiving Right of Remonstrance for Street Improvements	A-6

TABLE OF AUTHORITIES

PAGE

Cases

<i>Gardner v. Broderick</i> , 392 U.S. 273 (1968)	5
<i>Larsson v. City of Lake Oswego</i> , ___ Or LUBA ___ (pending)	7
<i>Nelson v. City of Lake Oswego</i> , ___ Or App ___ (pending)	2
<i>Nelson v. City of Lake Oswego</i> , ___ Or App ___ (pending)	2
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	3
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	4

Statutes

U.S. Const., amend. I	4-6
U.S. Const., amend. V	5

Miscellaneous

Comment, <i>Unconstitutional Conditions</i> , 73 Harv. L. Rev. 1595 (1960)	4
Laurence H. Tribe, <i>American Constitutional Law</i> (2d ed. 1988)	5

In the Supreme Court of the United States

October Term, 1993

No. 93-518

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD, OREGON,

Respondent.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE*
THOMAS H. AND ESTHER H. NELSON
IN SUPPORT OF PETITIONER

IDENTITIES AND INTERESTS
OF *AMICI CURIAE*

*Amici curiae*¹ Thomas H. and Esther H. Nelson ("*Amici*") own real property in the City of Lake Oswego, Oregon. Lake Oswego abuts the municipal boundary of the Respondent City of Tigard on the east. Because *Amici* are now actively litigating claims against the City involving issues highly similar to those arising in the

¹ Letters from counsel for Petitioner and Respondent consenting to the filing of this brief by *amici curiae* have been filed with this Court.

Dolan v. City of Tigard situation, *Amici* sought and received permission to submit this *amicus curiae* brief.

Several years ago *Amici*, who sought to build a dwelling on a lot they had purchased earlier, became involved in land use disputes with the City of Lake Oswego. Two of *Amici*'s legal challenges to Lake Oswego's land use practices are now pending before the Oregon Court of Appeals. The first of those challenges is almost identical to that of Petitioner: Whether compensation must be paid in return for the surrender of possessory interests in real estate that were demanded as a condition of issuance of a land use permit.² In *Amici*'s case, the governmental permit was a "lot line adjustment," which is an administrative action that conformed Lake Oswego's municipal land ownership records to the records on file in the Clackamas County courthouse. The real property interest demanded and taken is a 55-foot-wide drainage easement that bisects *Amici*'s lot and the neighboring lot. The second pending challenge, which also arose as a condition in the lot line adjustment approval, is an attempted class action that would test the validity of "nonremonstrance agreements." Such agreements, upon which a variety of land use permits are routinely conditioned, prohibit the signatories and their successors in title from opposing the formation of local quasi-municipal "improvement districts." The conditions appended to *Amici*'s lot line adjustment approval are reprinted herein as Appendix A. The requirement that a 55-foot-wide easement be granted the City of Lake Oswego is condition 6, and the requirement that a nonremonstrance agreement be submitted is condition 4. The text of the required nonremonstrance agreement is reprinted as Appendix B.

To date, *Amici* have been unsuccessful in their claim against the City of Lake Oswego based upon alleged inverse

² That litigation, *Nelson v. City of Lake Oswego*, is pending in the Oregon Court of Appeals, Docket No. A78257.

³ That litigation, *Nelson v. City of Lake Oswego*, is also pending before the Court of Appeals, Docket No. A76358.

condemnation, in large part because of the Oregon Supreme Court's decision in *Dolan*. Regardless of the rationale this Court employs, it is expected that this Court's decision will have a direct impact upon *Amici*'s claim for just compensation. In addition, should this Court employ the doctrine of unconstitutional conditions in the *Dolan* context, the Court's decision could also affect *Amici*'s claims arising from alleged violations of political and civil rights.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's statement and description of the opinions below, jurisdiction, statutes involved and statement of the case.

SUMMARY OF THE ARGUMENT

In addition to reversing the decision of the Oregon Supreme Court on a "takings" basis, this Court should consider reversing and remanding the matter for trial on the broader, independent legal grounds that the City unconstitutionally required Petitioner to surrender a valuable legal right as a condition of its grant of a governmental permit.

ARGUMENT

Amici agree with Petitioner that the decision below should be invalidated because it is in conflict with this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *Amici* suggest that the Court also consider and address the practice the City of Tigard used to achieve the exaction, viz., requiring Petitioner to surrender a valuable legal right in return for what is

acknowledged to be a governmental privilege. Because *Amici* presently have a similar inverse condemnation claim now before the Oregon Court of Appeals and because *Amici* have immediate experience regarding municipalities' widespread resort to conditioning a privilege upon the required surrender of important rights, they sought to participate in this case.

The government may not condition its grant of a privilege upon the surrender of a constitutional right. See generally Comment, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960). *Sherbert v. Verner*, 374 U.S. 398 (1963), applied the prohibition against conditioning privileges upon surrender of rights in a freedom of religion context. As this Court stated in *Sherbert*, individual rights may not be "infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. The dispute therein arose when a Seventh-Day Adventist was fired for refusing to work on Saturday, and South Carolina refused unemployment compensation because of the failure to accept suitable work. This Court invalidated the denial on the grounds the right to a discretionary benefit could not be conditioned upon surrender of basic freedoms. The Court said:

In *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly."

374 U.S. at 405.

Gardner v. Broderick, 392 U.S. 273 (1968) ("*Gardner*"), extended the prohibition of *Sherbert* to rights beyond the First Amendment. In *Gardner*, a New York policeman was asked to testify to a grand jury regarding police bribery and corruption. He refused and was therefore fired. His request for reinstatement was denied, and the case ultimately found its way to the U.S. Supreme Court. That Court held that his firing was unconstitutional; in so doing, the Court reflected the rationale that is directly applicable to this appeal: The grant of a governmental privilege cannot be conditioned upon surrender of an independent legal right. There, the privilege was continued employment as a governmental employee. The independent right required to be surrendered was the Fifth Amendment's guarantee against self-incrimination.

Professor Tribe has succinctly summarized the doctrine of unconstitutional conditions:

The notion that, whenever a privilege or benefit might be withheld altogether, it may be withheld on whatever conditions government chooses to impose, has been repeatedly repudiated since the mid-20th century. Independently unconstitutional conditions--those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right--are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in the particular context.

Laurence H. Tribe, *American Constitutional Law* § 11-5, at 781 (2d ed. 1988) (footnote omitted).

The doctrine of unconstitutional conditions provides an independent basis for invalidating the actions of the City of

Tigard. *Amici* respectfully request this Court to consider and address the rationale of unconstitutional conditions in this case not only because it is a sound basis for analysis and decision, but also because municipalities in general, and Oregon municipalities in particular, routinely condition land use decisions upon the surrender of fundamental constitutional rights *other than* property rights. For example, many Oregon municipalities routinely require applicants for land use permits to surrender the most basic First Amendment freedoms. Using the doctrine of unconstitutional conditions in the *Dolan* context would undercut this widespread and pernicious practice.

Amici have had firsthand experience with municipalities' conditioning land use permits upon the surrender of First Amendment freedoms. In *Amici's* situation, the City of Lake Oswego conditioned its grant of the lot line adjustment--again, a process whereby the City's real property records were conformed to match those of the county--not only upon the requirement that a 55-foot-wide easement across two lots be granted to the City, but also upon *Amici's* and their neighbors' entering into "non-remonstrance agreements" with the City. The nonremonstrance agreement (the full text of which is reprinted herein as Appendix B) violated *Amici's* First Amendment freedoms by conditioning the lot line adjustment on the applicants entering into the following "agreement":

In consideration of not being required to improve [bordering] streets at this time, [*Amici*] hereby waive any and all right to remonstrate against the improvements of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. [*Amici*] irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the

improvement, such assessment to be made in accordance with the applicable laws and ordinances as the same may exist at the time of the improvement. . . .

Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The full text of the nonremonstrance agreement is reprinted in Appendix B.

Nonremonstrance agreements are common in Oregon; the City of Lake Oswego has recorded hundreds of them in the property records of the Clackamas County courthouse, and a survey of the practices of Oregon counties and municipalities disclosed that at least 30 of the larger municipalities in Oregon routinely require nonremonstrance agreements. Indeed, the undersigned represents private homeowners, William and Debra Larsson, who are now challenging the City of Lake Oswego's requirement that the Larssons provide the City with a nonremonstrance agreement similar to Appendix B as a condition of the City's issuance of a minor partition.⁴

The purpose of nonremonstrance agreements is purely political: to facilitate the formation of local improvement districts by removing from the landowner and his successor(s) in title the constitutional right to object to the government's attempt to form such districts. Both the Oregon and U.S. Constitutions guarantee individuals the right to free speech and the right to petition their

⁴ *Larsson v. City of Lake Oswego*, Oregon Land Use Board of Appeals Docket No. 93-174 (oral argument scheduled for January 13, 1994).

governments for redress of grievances. Both the Oregon and U.S. Constitutions also guarantee individuals the right to vote. Nonremonstrance agreements rob the landowner and his successors of those rights. Because the grant of the permit was conditioned on the surrender of fundamental civil and political rights, *Amici* submit that under the doctrine of unconstitutional conditions those agreements are void.

CONCLUSION

It is clear that the Court's decision in this case will affect *Amici's* claim that just compensation must be paid for the City of Lake Oswego's taking of a 55-foot-wide drainage easement in return for a lot line adjustment. By expanding the analysis of the *Dolan* case to encompass the doctrine of unconstitutional conditions, this Court can assist in eliminating the abuse inherent in nonremonstrance agreements of conditioning a wide variety of land use permits upon the recipients' surrender of civil and political rights. Because of the importance of those fundamental freedoms and because of the widespread use of nonremonstrance agreements by Oregon municipalities, *Amici* respectfully invite the Court to consider the doctrine of unconstitutional conditions in the *Dolan* context.

Respectfully submitted,

Thomas H. Nelson
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Amici Curiae

January 12, 1994

APPENDIX

A-1

APPENDIX A

Reprint of Portions of

Staff Report
CITY OF LAKE OSWEGO
Land Development Services Division

APPLICANT:

Thomas Howard
Nelson/Daniel Reis

FILE NO.:

SD 1-89

PROPERTY OWNER:

Thomas Howard
Nelson/Daniel Reis

STAFF:

Michael R. Wheeler

LEGAL DESCRIPTION:

Tax Lot 100, 102 of
Tax Map 2 1E 15AA

DATE:

March 21, 1989

LOCATION:

Northeast corner of
intersection of Chapin
Road and Cherry Lane

NEIGHBORHOOD
ASSOCIATION:

Hallinan

COMP. PLAN
DESIGNATION:

R-15

ZONING
DESIGNATION:

R-15

I. APPLICANT'S REQUEST

The applicants are seeking approval for a lot line adjustment to reconfigure two parcels, both in excess of 15,000 square feet.

III. ACTION-TAKEN

The staff approves the proposed minor partition, subject to the following conditions:

1. A final plan (as depicted in Exhibit 3, and modified as described in conditions number 5, 6, 7 and 8) shall be submitted to City staff for review and signature of approval within one year of the date of this decision. Upon written application, prior to expiration of the one year period, the City Manager shall, in writing, grant a one year extension. Additional extensions may be requested in writing and must be submitted to the City Manager for review of the project for conformance with the current law, development standards and compatibility with development which may have occurred in the surrounding area. The extension may be granted or denied and, if granted, may be conditioned to require modification to bring the project into compliance with then current law and compatibility with surrounding development.
2. The final plan shall be registered with the Clackamas County Surveyor's Office and recorded with the Clackamas County Clerk's Office.

3. Legal descriptions (metes and bounds) to be specified on legal instruments for title transfer for recording with the Clackamas County Clerk's Office shall be provided to City staff for review. Actual recording shall not be a condition of approval of this decision. However, when recorded, the instruments for both parcels shall reference this land use application -- City of Lake Oswego Land Development Services Division, File No. SD 1-89.
4. *The applicants shall sign nonremonstrance agreements and petitions for future improvements to both Cherry Lane and Chapin Road.*
5. The final plan shall be modified to show prior rights-of-way dedicated along Chapin Road and Cherry Lane.
6. *Modifications to the plan demonstrating conformance with the Stream Corridor Development Standard shall be submitted for the review and approval of staff. The area which coincides with the stream corridor buffer zone shall be dedicated by the applicant to the public in an easement for storm drainage purposes.*
7. The applicants shall demonstrate whether or not the existing dwelling on Parcel I is connected to sanitary sewer. In the event that the applicants cannot demonstrate

A-4

such connection, the final plan shall be modified to show the limits of an easement for the existing septic tank and drainfield, necessary to provide for access and maintenance. This easement shall be temporary in nature and shall terminate upon connection to the existing sanitary sewer.

8. The final plan shall be modified to show the limits of a private utility easement for sanitary sewer over Parcel II to serve Parcel I.
9. The existing dwelling shall be connected to sanitary sewer through the easement described in number 8 above.
10. Evidence of the above to be provided to the Public Works and Development Services Department prior to the issuance of building permits requested subsequent to the date of this approval.
11. Surface water may be directed to the stream corridor. An erosion and siltation control plan shall be submitted upon

A-5

application for a building permit for Parcel II. Conformance to an approved plan shall be a condition of building permit approval.

Prepared by:

/s/ Michael R. Wheeler
MICHAEL R. WHEELER
Associate Planner

22 March 1989
Date

Approved by:

/s/ Karen M. Scott
KAREN M. SCOTT
Assistant City Manager
Planning and Development

3/22/89
Date

Exhibits

1. Tax Map
2. Applicant's Narrative
3. Site Plan
4. Legal Descriptions
5. As-built Drawings: Sanitary Sewer (portion)

(Emphasis added.)

APPENDIX B

Reprint of

RESTRICTIVE COVENANT
WAIVING RIGHT OF REMONSTRANCE
FOR STREET IMPROVEMENTS

The undersigned, being the legal owners of the real property described below, do hereby consent to the improvement of the public streets bordering said property. In consideration of not being required to improve the said streets at this time, we hereby expressly waive any and all right to remonstrate against the improvement of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. We irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the improvement, such assessment to be made in accordance with applicable laws and ordinances as the same may exist at the time of the improvement. It is understood that "improvement of streets", as the term is used herein, includes construction of curbs and gutters, sidewalks, storm drains, illumination, traffic control

devices, and all other work and improvements deemed necessary by the City of Lake Oswego to bring the streets into conformance with applicable improvement standards.

Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The signatures appearing on this document are to be construed as equivalent to signatures appearing on a petition to form a Local Improvement District for the aforesaid purposes.

The covenants herein contained shall be binding upon the undersigned and upon all subsequent owners of said property as covenants running with the land and effective for twenty years from the date hereof; provided, however, that the City of Lake Oswego shall have the right to extend the covenants for an additional twenty years by recording a notice of such extension in the deed records of the County in which said property is situated prior to the expiration of the first twenty-year period.

The property subjected to these covenants is a tract of land situated in the Northwest 1/4 of Section 14 and the Northeast 1/4 of Section 15, Township 2 South, Range 1 East of the Willamette

A-8

Meridian, as more fully described in Attachment No. 1, attached hereto and by this reference incorporated herein.

/s/ Thomas H. Nelson
Thomas H. Nelson

/s/ Esther H. Nelson
Esther H. Nelson